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WHEN A CHATTEL BECOMES A FIXTURE.—There seem to be very few instances in which the word "fixture" occurs in the early records, and the Year Books show no substantive law under such a title. Nevertheless, the nucleus of the law on this subject existed at that time, and is found among the subordinate divisions of other and, at first sight, unconnected heads of the law. The underlying principle of the subject has played no small part in determining what shall be deemed the testator's personal estate or assets in the hands of executors or administrators, and even a more important part in the law of landlord and tenant in connection with the subject of waste.[1] And this is a circumstance of great significance, since out of this grew the common law doctrine that the mode of annexation, i. e., whether slight or permanent, was the main test for determining *real* fixtures. If the article was permanently attached to the realty it was conclusively deemed part and parcel of the freehold, and the tenant's destruction or removal of it constituted waste, because it was a destruction of the inheritance. If, however, the article was slightly attached to the realty, and severance therefrom could be made without damage to the freehold, it was considered a chattel, and a removal or destruction of it was not waste. Roughly speaking, therefore, waste was the law of fixtures regarded from the landlord's point of view, and fixtures was the same law from the tenant's point of view.

The term "fixture" has been defined as an article which was

[1] 13 AM. & ENG. ENC. L. 594.

once a chattel but which has been so annexed to realty as to constitute part and parcel of the freehold,[2] as contradistinguished from a mere chattel.[3] This is the sense in which the term is generally used in the decisions, though many courts of high standing have so loosely applied the term that it involves an ambiguity; and it is sometimes uncertain whether the court in using the term is referring to chattels annexed to land where the ownership of the chattel may subsequently be separated from that of the realty, or where it may not be so separated. The confusion thus introduced into the terminology of the subject may be obviated, to some extent at least, by terming those fixtures which retain their character as personalty "*personal* fixtures," and those which have become inseparably a part of the freehold "*real* fixtures." [4] The general tests or criteria which the courts have applied in differentiating real fixtures from personal fixtures have been subject to constant change, and are even more indefinite than the definition of a real fixture. The general course of modern decisions, in both English and American courts, shows a tendency to accord less and less importance to the common law doctrine that the mode of annexation, i. e., whether slight or permanent, constitutes the principal criterion, and favor as a principal test the adaptation of the chattel to the use or purpose for which the realty is held or employed.[5]

Three general tests have been applied by the courts in determining in a particular case whether the fixture is real or personal: First, the adaptation of the article to the use or purpose to which the realty is appropriated; second, the interest in the realty of the party making the annexation; third, the degree of permanency of the annexation. It is obvious that these tests are but evidential facts, more or less forcible, and do not form definite criteria; and, further, they are subject always to the relation and special agreement of the parties.[6] From the concurrent application of these tests the courts deduce the legal intent of the party making the annexation and determine whether or not a permanent accession has been made to the realty. It should be noted that the intent mentioned in this connection is not the undisclosed purpose lurking in the mind of the party making the annexation, but the legal intent implied from and manifested by his acts. It is the intent which settles, not merely the property rights of the chattel owner himself, but also the property rights of others who may acquire an interest in the chattel annexed. Property rights of third persons are not controlled by the secret purpose in the mind of the party making the annexation, but are governed by the inferences to be drawn from what is external and visible.[7]

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[2] Teaff *v.* Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634.
[3] See Miller *v.* Plumb, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456.
[4] See 1 MINOR, REAL PROP., § 24.
[5] See Clifton First Natl. Bank *v.* Clifton Armory Co., 14 Ariz. 360, 128 Pac. 810, Ann. Cas., 1915A, 1061.
[6] Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33.
[7] Hopewell Mills *v.* Bank, 150 Mass. 519, 15 Am. St. Rep. 235.

Most of the authorities hold, and it is believed to be sound, that there must be a physical and actual annexation of the chattel to the realty [8]—constructive annexation not being sufficient—and that the three so-called tests mentioned above are nothing more than cumulative facts, which if extant determine with reasonable precision whether or not an article is a real fixture. Annexation alone is insufficient as a test.[9] The object, effect and degree of the annexation are factors which must be considered in determining the nature of the fixture in each doubtful case.

The first test classified above, i. e., the adaptation of the article to the use or purpose for which the connected realty is appropriated, is very generally given much weight as a criterion by modern authority, and there is a tendency to regard everything as a real fixture which has been attached to the realty in furtherance of the purpose in which the realty is employed.[10] It is believed, however, that too much importance has been attributed to this test. In the recent case of *Ballard* v. *Alaska Theater Co.* (Wash.), 161 Pac. 478, the defendant equipped a leased theater with furnishings especially adapted in shape and color to the particular building. Upon the termination of the lease and removal by the lessee of the equipment, the lessor of the theater sued to recover the value of the equipment, on the ground that it constituted a real fixture and, by virtue of that fact, belonged to him as owner of the realty. The court denied a recovery. It would seem that this holding is consonant with reason and principle. The lessor of a dwelling house for a term of years would wish the furnishings and fixtures he places therein to correspond to the general contour and color of the building; so with the lessee of a building to be used as a place of merchandise; and the lessee of a building to be used for manufacturing purposes would be controlled by the form and style of the building in selecting the machinery. It would seem unreasonable to contend in any such instance that this fact would be a controlling element in determining whether the furnishings became a part of the realty as a matter of legal intendment.

The second test, i. e., the interest in the realty of the party making the annexation, is an important circumstance in ascertaining the probable intent with which chattels were annexed to the realty. A fee simple owner is presumed to intend a permanent accession to the realty when he places an improvement thereon which will enhance its usefulness and market value. If, under such circumstances and before severance, the owner of the inheritance die intestate, the article will descend to his heirs as a real fixture, together with the land. So, also, if he devise or convey the realty, not having severed the fixtures therefrom, they will pass with the land to which they are annexed. If, however, the

[8] Cook *v.* Whiting, 16 Ill. 480.

[9] Atchison, etc., Ry. Co. *v.* Morgan, 42 Kan. 23, 21 Pac. 809, 42 L. R. A. 284. See Ottuma Woolen Mills Co. *v.* Hawley, 44 Iowa 57, 42 Am. Rep. 719.

[10] Johnson *v.* Wiseman, 4 Metc. (Ky.) 357, 83 Am. Dec. 475.

party annexing the chattel be merely a lessee of the realty for a limited time, it is hardly probable that in annexing chattels of value he intended thereby to make a permanent gift of them to improve the landlord's property, and there must in such a case be other corroborative evidence, in addition to the fact of annexation, to establish so eccentric a purpose.

The third test, i. e., the extent or permanency of the annexation, is believed to be the most determinative element to be considered with the fact of annexation. On reason and principle, it would seem that in case of very slight attachment the court could not infer a legal intent, on the part of the chattel owner, to make a permanent accession to the realty when in fact just the opposite is manifested by his acts. On the other hand, where the chattel has been so permanently affixed to the realty that severance without injury to the freehold is impossible, this is a strong indication that permanency of annexation was intended.[11] The chattel owner in such case would be inconsistent to assert that he intended no permanent accession, when his acts on their face manifest the opposite intent.

In treating the subject of fixtures, some text-writers [12] and judges,[13] have classified intent on the part of the person making the annexation, along with the criteria treated above, as one of the tests to be applied in determining real fixtures. This is very likely to introduce confusion into the subject. If this intent means the undisclosed purpose in the mind of the party attaching the chattel, it is of no effect; because the court in determining property rights must be guided by the external and visible acts, and from these deduce the legal intent. Where the acts of one have led others to assume a certain relation to property, the secret intention of the party at fault cannot be asserted to the prejudice of those misled.[14] Again, if the intent means *legal* intent, then it is obvious that the other so-called criteria are really parts of this comprehensive test of intention, and that they derive their chief value from the fact that they furnish *evidence* of such an intention.

It is held by some authorities that where there is an intention to permanently annex an existing chattel to the realty in the future a constructive annexation takes place, and the chattel is thereby converted *in presenti* into a real fixture.[15] It is believed that this doctrine is unsound. The reason for applying the test in any doubtful case is to determine the rightful owner of the property in question, and the law is equally as zealous to protect the rights of the party making the annexation as it is to protect the rights

[11] Providence Gas Co. *v.* Thurber, 2 R. I. 15, 55 Am. Dec. 621; Woodham *v.* Bank, 48 Minn. 67, 50 N. W. 1015, 31 Am. St. Rep. 622.
[12] 1 TIFFANY, REAL PROP., § 232.
[13] Ottuma, etc., Co. *v.* Hawley, *supra.*
[14] Hopewell Mills *v.* Bank, *supra.*
[15] Rohm *v.* Donayer, 137 Iowa 18, 114 N. W. 546, 15 L. R. A. (N. S.) 727; Byrne *v.* Werner, 138 Mich. 328, 101 N. W. 555, 69 L. R. A. 900, 110 Am. St. Rep. 315; Hackett *v.* Amsden, 57 Vt. 432.

of the realty owner. Hence, any policy which tends to favor either party works a legal injustice to the other. It is readily seen that the doctrine of constructive annexation is based entirely upon the intent of the chattel owner to add to the realty in the future. But the basis of the landlord's claim to the fixture in any case is that they have *already* become part and parcel of his realty. Therefore, to hold that constructive annexation is sufficient to entitle the landlord to claim the fixture is in effect holding that the article is then a part of the realty, which is directly in opposition to the actual fact. It can hardly be correct upon principle that a mere intention, which may never be given effect, to annex a chattel to the leased premises will give to the lessor, by construction of law, a vested right in the unattached chattel.[16]

TRADE-MARKS AND UNFAIR COMPETITION.—The rapid development of modern business conditions has served to present the general question of unfair competition in a multitude of forms unknown to the courts of a generation past. An analysis of the many cases would seem to show two broad divisions, namely, a direct infringement of the technical, arbitrary, registered trade-mark, and unfair competition as exemplified in many various and ingenious ways of "dressing up" a certain product, with intent to deceive the general public as to its origin and reputation.

The first broad division presents no difficulty. It is perfectly obvious that injunction and accounting will be granted for the infringement of valid registered trade-marks that combine those qualities calculated to produce a unique, arbitrary and distinctive symbol or device under which a product may be known and marketed.

The second division under this topic is possible of subdivisions into several more or less distinct headings that will be treated under the general title of "unfair competition"—a title that logically includes the first broad division, but one which the earlier development of the law of trade-marks has restricted by the creation of an independent title in the law. The distinction is important, however, for the strict hold acquired by trade-mark terminology upon the judicial mind is discernible in many cases of unfair competition, that have been tried and decided upon theories applicabe only to trade-mark cases. This finds illustration in those instances where relief has been denied upon the ground that the characteristic device, symbol, or "dress" peculiar to the goods of the plaintiff did not *ipso facto* constitute a valid trade-mark—without regard to the now firmly established doctrine which relieves against any attempt on the part of the defendant to so market his wares that the public may reasonably be expected to confuse them with the more established product. It is obvious that, in this latter case, the exist-

[16] Johnson *v.* McHaffey, 43 Pa. St. 308, 82 Am. Dec. 568.